MOTION FILED
JAN 16 1987

No. 86-44

In the Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS, INC. and
MARY ANN McNULTY,
Petitioners,

vs.

EUGENE McMAHON, JULIA McMAHON, individually and as trustees of THE DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN, THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN, THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN, and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Bruce Cordray, Pamela M. Cordray, Gene C. Griffin, Gertrud Griffin, Mary Grace Norman, Oralia P. Pool, Ofelia Rodriguez de Quijas, Jose Luis Rodriguez Moreno, Martha Leticia Rodriguez Moreno, Luis Alejandro Rodriguez Moreno, Beatriz Rodriguez, Gloria Storey and Adelina Trapero

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TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Bruce Cordray, Pamela M. Cordray, Gene C. Griffin, Gertrud Griffin, Mary Grace Norman, Oralia P. Pool, Ofelia Rodriguez de Quijas, Jose Luis Rodriguez Moreno, Martha Leticia Rodriguez Moreno, Luis Alejandro Rodriguez Moreno, Beatriz Rodriguez,

Gloria Storey and Adelina Trapero, by and through their attorney of record, and would respectfully show the Court as follows:

I.

Amici are Plaintiffs in securities and RICO fraud cases now pending in federal district court, Southern District of Texas, Brownsville Division. Amici believe that under Texas law, they have claims which would not be arbitrable but for the Federal Arbitration Act. Such cases not only involve similar legal questions, they also involve Shearson/American Express and the same arbitration clause which was utilized in the case now before this Court.

II.

Amici have sought since November of 1986, the consent of the parties, however only Respondents, as evidenced by Exhibit "A", have granted consent.

III.

As shown by Exhibit "B", counsel for Respondents have made an attempt on behalf of the Amici to secure the consent of Petitioners.

IV.

Amici believe that there exist in this case, facts or questions of law which will not be adequately presented by the parties, some of which are peculiar to Texas law.

V.

Amici believe that this case is of great significance to what can generally be described as consumer protection

law because of the RICO issues involved. So long as a non-arbitrable, broad anti-fraud weapon exists for consumers, the many consumer rights which exist by way of both federal and state statute will not be threatened by adhesion contracts with arbitration terms designed to extract unilateral benefit for the businesses that prepare such contracts. Moreover, unless a reasonable view is taken of the intent of the Federal Arbitration Act and the intent of RICO, other public rights will also be significantly and adversely impacted. Amici would, for example, question the desirability of compelling the arbitration of sexual or racial employment promotion discrimination claims, a result which could be effected through the use of adhesion employment contracts. Nor would it seem reasonable to permit every attorney to use the Federal Arbitration Act to effectively opt out of bar grievance proceedings through utilization of an adhesion arbitration term inserted in client contracts. Given the expansive post-Federal Arbitration Act view of the Commerce Clause, that is a very real possibility.

VI.

Amici further believe that a major premise in this case, that federal district court dockets can be reduced through arbitration of these claims, is not only impermissible, but it is also factually wrong. The simple absence in the Federal Arbitration Act of a definition of arbitration will generate significant litigation since invariably those who create the adhesion contract arbitration terms in non-securities contexts, will create new arbitration forums attempting to extract advantages. An arbitration explosion will also, because of the hundreds of apparently inconsistent state arbitration laws and con-

sumer protection laws, create significant federal court litigation with respect to the threshold question of whether there is sufficient interstate or foreign commerce present to trigger application of the Federal Arbitration Act. That issue is generally not relevant to the securities fraud area and not directly relevant to this case. It is an issue which will be, however, highly relevant to the wave of future attempts in consumer contexts to utilize the Federal Arbitration Act. Further, there will be increased enforcement and review of award involvement by the federal district courts.

VII.

Further, Amici believe that this case does not adequately present significant preliminary legal remedy questions like sequestration and temporary equitable relief, which would be relevant to some arbitration applications not only in the securities field, but also generally in the area of consumer affairs.

VIII.

Finally, Amici believe that the case presented by amici briefs submitted by the parties and by the American Arbitration Association, the Securities Industry, and the Securities and Exchange Commission, do not present an accurate analysis of arbitration itself. Amici, whose lawsuits are pending in federal district court in Brownsville, Texas, would dispute even the most basic tenet of arbitration advanced, namely that it is cost-effective. Most of these Amici live close to federal district court and since the nearest arbitration forum is hundreds of miles distant, arbitration will be anything but cost-effective for them.

WHEREFORE, PREMISES CONSIDERED, Amici request that this Court grant leave to file their Amicus Curiae Brief.

Respectfully submitted,

DENIS A. DOWNEY
DOWNEY & SULLIVAN
1185 F.M. 802, Suite 3
Brownsville, Texas 78521
(512) 544-0561
Attorney for Amici

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae Brief was served upon the following by First Class Mail, postage pre-paid, this 9th day of January, 1987:

Theodore A. Krebsbach
Two World Trade Center
New York, New York 10048

Eppenstein & Eppenstein
150 E. 58th Street
Suite 2400
New York, New York 10155-0071

DENIS A. DOWNEY
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Attorney for Amici

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORDER

CAME ON to be heard the Motion of Bruce Cordray, Pamela M. Cordray, Gene C. Griffin, Gertrud Griffin, Mary Grace Norman, Oralia P. Pool, Ofelia Rodriguez de Quijas, Jose Luis Rodriguez Moreno, Martha Leticia Rodriguez Moreno, Luis Alejandro Rodriguez Moreno, Beatriz Rodriguez, Gloria Storey and Adelina Trapero,

Amici for leave to file an amicus curiae brief in the above styled case and the Court, having considered same, is of the opinion that it should be, and is GRANTED.

.....

Justice Presiding

DATED: .....

EXHIBIT "A"

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

SHEARSON/AMERICAN EXPRESS, INC. &
MARY ANN McNULTY,
Petitioners

VS.

EUGENE McMAHON, JULIA McMAHON, Individually and as Trustees of THE DAVID HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON, INC. PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,
Respondents

CONSENT TO FILE AMICUS CURIAE BRIEF

COME NOW ORALIA POOL, ADELINA TRAPERO, MARY GRACE NORMAN, MARTHA LETICIA RODRIGUEZ, BEATRIZ RODRIGUEZ, JOSE LUIS RODRIGUEZ, LUIS ALEJANDRO RODRIGUEZ, OFELIA RODRIGUEZ DE QUIZAS, GENE GRIFFIN, GERTRUD GRIFFIN, PAMELA CORDRAY, BRUCE CORDRAY and GLORIA STOREY, by and through their attorney of record Denis A. Downey and submit the following consent for the filing of an Amicus Curiae brief pursuant to Rule 29, Federal Rules of Appellate Procedure:

CONSENT

The undersigned does hereby consent to the filing of an amicus curiae brief by Denis A. Downey on behalf of the above-referenced individuals in the above-styled case.

EPPENSTEIN & EPPENSTEIN, ESQ.
Attorney for Respondents
61 Broadway, Suite 2205
New York, New York 10006
By: /s/ Madelaine Eppenstein

Respectfully submitted

DOWNEY & SULLIVAN
1185 F.M. 802, Suite 3
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(512) 544-0561
By: /s/ Denis A. Downey
Denis A. Downey
Bar Card No. 06085500

EXHIBIT "B"

EPPENSTEIN AND EPPENSTEIN
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150 East 58th Street
New York, New York 10155-0071
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December 10, 1986

VIA MESSENGER

Theodore A. Krebsbach
First Vice President
Associate General Counsel
Shearson Lehman Brothers
Two World Trade Center
105th Floor
New York, New York 10048

RE: Shearson v. McMahon, 86-44 (S.Ct.)

Dear Ted:

I have just received copies of the letters you apparently have sent to Mr. Lathrop and Mr. Downey regarding their request to file amicus briefs on behalf of respondents. At my request, your office sent these copies by messenger since as of today we have not received same by mail.

We wish to call your attention to the fact that we voluntarily consented without delay or equivocation to the filing of amici curiae briefs by the following on behalf of petitioners: the American Arbitration Association and the Securities Industry Association, which is comprised of at least two dozen member firms. In light of our cooperation, we honestly cannot understand your failure to likewise grant the request of amici curiae on behalf of respondents, who at this point are only two in number. Both amici who have sought your consent are, we under-

stand, parties to cases pending either in the Supreme Court or the lower federal courts that involve one or all of the issues presented herein. This was the basis upon which we granted our consent to amici submitting briefs on behalf of petitioners.

In a case of this importance, especially where it seems there will be a limited number of amici curiae on both sides, it seems reasonable to assume that the Court wishes to hear from all quarters. As I mentioned in my letter of November 13, 1986, Richard Taranto, Esq. of the Solicitor General's Office, elicited respondents' position in writing. In addition, Mr. Taranto had suggested informally that respondents would be well-advised to enlist amici curiae interested in submitting other views for the Court's consideration. As you well know, the Court is always interested in the views of amici curiae. The parties who have requested your consent, if not given that consent, will be put to the task of motion practice before the Court, which I am sure will not be a welcome burden for the Justices.

Since respondents and their amici curiae deadline is rapidly approaching, we request that you reconsider your position and grant your consent to respondents' amici curiae. Then, it will be up to the Court and not the parties as to what weight to accord same.

We await your response.

Very truly yours,

Madelaine Eppenstein

ME:lma

cc: Stirling Lathrop, Esq.
Denis A. Downey, Esq.
VIA FEDERAL EXPRESS